

STATE OF MICHIGAN
COURT OF APPEALS

AFIFEH AYAD BERRY,

Plaintiff-Appellant,

v

MICHAEL BERRY,

Defendant-Appellee.

UNPUBLISHED

May 19, 2000

No. 213488

Wayne Circuit Court

Family Division

LC No. 97-720147-DM

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

ZAHRA, J. (*concurring in part and dissenting in part*)

I concur with the portion of the majority's opinion that affirms the judgment of divorce and respectfully dissent from the portion of the majority's opinion that reverses the trial judge's determination regarding the payment of attorney fees. An award of attorney fees rests in the sound discretion of the trial court and should remain undisturbed on appeal absent an abuse of discretion. Finding no abuse of discretion by the trial court, I would affirm the award of attorney fees as well as the judgment of divorce.

In *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), the Supreme Court described an abuse of discretion as a decision that is "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." Stated differently, an abuse of discretion cannot be found merely because a reviewing court applying the law to the facts at hand might have reached a different conclusion. By definition, the term "discretion" suggests that there is no single result that is correct but rather a variety of acceptable choices. In order for the exercise of discretion to constitute an abuse, the trial court's determination must defy logic and reason. With this standard in mind, I am firmly convinced that the trial court did not abuse its discretion in limiting the attorney fees awarded to plaintiff.

Attorney fees in a domestic relations matter are appropriate only where the party seeking the fees establishes that: (1) he or she is unable to bear the expense of attorney fees; and (2) the other party is able to bear the expenses. *Kosch v Kosch*, 233 Mich App 346, 354; 592 NW2d 434 (1999). In making this determination, the court may consider whether the party seeking fees would be required to invade the property settlement assets to pay the attorney fees, *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995), and whether the property settlement assets are necessary to the support of the movant. *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993). The party seeking the attorney fees must also demonstrate that the fees are reasonable. *Kosch, supra*. Whether an attorney fee is reasonable is determined by considering two factors: (1) the hourly rate and the number of hours spent on the case by counsel; and (2) the reasonableness of the claims asserted by the party seeking an award of attorney fees. *Rogner v Rogner*, 179 Mich App 326, 330; 445 NW2d 232 (1989); *Curylo v Curylo*, 104 Mich App 340, 352; 304 NW2d 575 (1981). If one party's litigation strategy contributes substantially to the legal expenses, the court may consider the validity of that strategy when determining reasonableness of the fees requested. *Id.*

In the present case, the trial court's order regarding attorney fees left unpaid \$17,425 of plaintiff's \$47,405 bill for legal services. Of the approximately \$30,000 in fees and costs paid to plaintiff's counsel, \$10,000 came exclusively from defendant's post divorce assets and \$20,000 was paid from predivorce marital assets.¹ While there existed a disparity in income between the litigants (\$66,000 post retirement income for defendant and \$25,000 in income for plaintiff), the trial court in rendering its judgment in this case placed significant emphasis in the fact that defendant was 78 years old at the time of trial and in poor health. By contrast, plaintiff was 35 years of age and the trial court found plaintiff to be in reasonably good health. The trial court further found that any health problems suffered by plaintiff would not impede her ability to work. Thus, plaintiff, through gainful employment and not through the depletion of post judgment marital assets, has the ability to pay the balance of her attorney fees.

Further, the litigation strategy employed by plaintiff supports the trial court's disposition of the attorney fees issue. Plaintiff alleged defendant violated a temporary restraining order preserving the marital assets. The trial court found no merit to this claim. Plaintiff also challenged the validity of the prenuptial agreement. The court found the agreement was not unconscionable when executed and was not entered into by plaintiff under duress. Finally, plaintiff attempted to avoid the effects of the prenuptial agreement by claiming that: (1) defendant failed to disclose material facts regarding defendant's net worth; and (2) plaintiff's health had deteriorated to the point that the prenuptial agreement was rendered unfair and unreasonable. The trial court conducted an evidentiary hearing on these issues and found that plaintiff's claims of debilitating health were not credible. The trial court further found that plaintiff failed to demonstrate that the prenuptial agreement was obtained through nondisclosure of material fact relating to defendant's net worth. In short, the attorney fees incurred by both litigants were enhanced significantly by plaintiff's litigation strategy. The trial court specifically found plaintiff lacked credibility on several points critical to her case. Plaintiff was a 35-year-old employable individual while defendant was 78 years of age and in deteriorating health. Under these circumstances, I cannot find that the trial court's ruling evidences a perversity of will or the exercise of

passion or bias. Rather, I conclude that the trial court exercised its discretion wisely in the award of attorney fees.

/s/ Brian K. Zahra

¹It may be argued that defendant contributed two thirds of the \$20,000 paid for plaintiff's attorney fees prior to trial because the prenuptial agreement, which was found valid and enforceable, provided that plaintiff would be awarded only 1/3 of the increase in value over the course of the marriage of non-trust assets.